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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1252

In The

Supreme Court of the United States

October Term, 1987

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed January 20, 1988
Certiorari Granted March 21, 1988

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APPENDIX A

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
7-16-86	3	AMENDED COMPLAINT—issued amended summons.
8- 6-86	5	ANSWER OF DEFT. NORTHWESTERN BELL TELEPHONE COMPANY TO FIRST AMENDED COMPLAINT.
9-10-86	15	NOTICE AND MOTION OF DEFT. NORTHWESTERN BELL TELEPHONE COMPANY TO DISMISS PLTFS.' RICO CLAIMS, ret. 10-1-86 at 10:00 a.m.
10- 2-86	21	MINUTES OF PROCEEDINGS (HHM) (KJG) Re: Deft. Northwestern Bell's motion to dismiss Count I, to dismiss Pltf's. RICO claims, to dismiss or stay entire case, and for partial summary judgment—argued, submitted, taken under advisement. 2. Pltfs.' motion to strike defenses and to make answer more definite and certain—argued, submitted, taken under advisement.
11-24-86	29	JUDGMENT that 1. plaintiffs' motion to strike defenses is denied; 2. defendant's motion to dismiss Counts II-V of plaintiffs' amended complaint is granted; and 3. defendant's motion to dismiss Count I of plaintiffs' amended complaint is granted, and Count I is dismissed without prejudice.
12- 4-86	30	MOTION OF PLTFS. TO AMEND OR ALTER JUDGMENT, with affidavit of Susan Bedor.
2-18-87	31	MEMORANDUM AND ORDER (HHM) that plaintiffs' motion for reconsideration is in all respects denied. (CC:Attys).
3-12-87	32	NOTICE OF APPEAL OF PLTF. H.J. Inc., et al hereby appeals to the U.S.C.A. 8th Circuit from the judgment entered on November 26, 1986, dismissing Pltf. Complaint and from the Order entered on February 18, 1987 denying Plaintiffs' Motion to Reconsider its November 26, 1986 judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J., Inc. et al Appellants - Plaintiff vs. Northwestern Bell et al Appellees - Defendant	)	No. 4-86 Civ 546 Clerk's Notice under Rule 77(d) F. R. Civil Procedure (Filed Nov. 16, 1987)

You are hereby notified that in the above-entitled cause, on the 12 day of Nov., 1987

We filed,

CERTIFIED COPY OF MANDATE FROM THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

CERTIFIED COPY OF JUDGMENT THAT: After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

FRANCIS E. DOSAL, CLERK

By: SJP
Deputy Clerk

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121MN

H. J. Inc., etc., et al, Appellants, vs. Northwestern Bell Telephone Company, etc., et al, Appellees.	)	Appeal from the United States District Court for the District of Minnesota.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 23, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121

H. J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Issac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated, Appellants, v. Northwestern Bell Telephone Company, a subsidiary of U. S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed coconspirators, Appellees.	)	Appeal from the United States District Court for the District of Minnesota.

Submitted: September 2, 1987

Filed: September 22, 1987

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

Plaintiffs appeal from the district court's [1] order dismissing their complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6); *H. J. Inc. v. Northwestern Bell Telephone Co.*, 648 F. Supp. 419, 430 (D. Minn. 1986). Appellants' complaint alleged, *inter alia*, violations of the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1961-68 (RICO). We affirm.

Because appellants' complaint was dismissed pursuant to Rule 12(b)(6), we view the facts alleged in their complaint in the light most favorable to them. *Bennett v. Berg*, 685 F.2d 1053, 1057-58 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983). The gravamen of appellants' complaint is that appellee Northwestern Bell Telephone Company undertook to illegally influence members of the Minnesota Public Utilities Commission (MPUC), the state regulatory body responsible for determining the rates which Northwestern Bell may charge. Appellants claim that Northwestern Bell sought to influence individual MPUC commissioners by various methods including cash gifts, employment offers, tickets to sporting and cultural events, airline tickets, meals and parties. Appellants allege a series of episodes beginning in 1980 and claim the practices continue through the present. The district court dismissed appellants' RICO claims for failure to allege a pattern of racketeering activity. *H. J. Inc.*, 648 F. Supp. at 423-26.

---

[1]The Honorable Harry H. MacLaughlin, United States District Judge, District of Minnesota.

The core requirement for a RICO violation is a pattern of racketeering activity. 18 U.S.C. § 1962. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275, 3287 (1985). At the minimum, at least two acts of racketeering activity[2] are required to establish a pattern. *Sedima*, 105 S.Ct. at 3285 n.14. However, "while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.'" *Id.* Prior to *Sedima* the pattern requirement could bet met by simply pleading two acts of racketeering activity. *See Superior Oil Co. v. Fulmer*, 785 F.2d 252, 255-56 (8th Cir. 1986). In *Sedima* the Supreme Court chastised Congress and the courts for failing to develop a workable definition of "pattern" which would limit the abuse of civil RICO. *Sedima*, 105 S.Ct. at 3287. Accordingly, this circuit has undertaken more meaningfully to construe the concept of "pattern."

We have followed the *Sedima* Court's intimations and have required the combination of continuity plus relationship to establish the necessary pattern. *Superior Oil*, 785 F.2d at 257. *See Holmberg v. Marrisette*, 800 F.2d 205, 209-10 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987). "The term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan), *quoted in Sedima*, 105 S.Ct. at 3285 n.14. The relationship prong is met when two or more racketeering acts are shown to be in pursuit of the same

---

[2]"Racketeering activity" has been defined to include a broad range of criminal offenses. 18 U.S.C. § 1961(1).

overarching scheme. *See Holmberg,* 800 F.2d at 210; *Superior Oil,* 785 F.2d at 257. The district court found that appellants' complaint satisfied the relationship prong. *H. J. Inc.*, 648 F. Supp. at 425. We agree.

The burden of establishing the continuity prong has proven more onerous. "The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969), *quoted in Sedima,* 105 S.Ct. 3285 n.14. In order to demonstrate the necessary continuity appellants must allege that Northwestern Bell "had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities." *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 329 (8th Cir. 1986). A single fraudulent effort or scheme is insufficient. *Id. See also Ornest v. Delaware North Cos.*, 818 F.2d 651, 652 (8th Cir. 1987) (single scheme over eight years to defraud plaintiffs of sales commissions); *Madden v. Gluck,* 815 F.2d 1163, 1164 (8th Cir. 1987) (defendant engaged in a vast array of fraudulent activities in pursuit of a single goal to keep a company afloat in order to loot it). Appellants' complaint alleges no more than a series of fraudulent acts "committed in furtherance of a single scheme to influence MPUC commissioners. . . ." *H. J. Inc.*, 648 F. Supp. at 425.

The district court did not err in finding that appellants' complaint failed to satisfy the continuity prong as

articulated in this circuit.[3] Therefore, because dismissal was appropriate under Rule 12(b)(6), we do not address the other issues raised in this appeal. The decision of the district court is affirmed.[4]

McMILLIAN, Circuit Judge, concurring.

I fully concur in the decision to affirm the district court's dismissal of the complaint for failure to satisfy the continuity prong of the pattern of racketeering activity test adopted by this circuit. I write separately only to state that I agree with Judge John R. Gibson that we should reconsider our pattern of racketeering activity test, in light of the contrary positions recently taken by several other circuits.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the court's opinion because I am satisfied that this result is compelled by our earlier cases commencing with *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986). In *Henning v. First Bank of Worthington,* No. 86-5320 (8th Cir. July 7, 1987), I concurred separately and expressed my view that the multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO. The Second and Sev-

---

[3]We are aware that our continuity plus relationship approach to the pattern requirement is not without criticism. *See Sun Savings & Loan Association v. Dierdorff,* No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987); *United States v. Ianniello,* 808 F.2d 184, 192 (2d Cir. 1986).

[4]Appellants also alleged in their complaint pendent state law claims which were dismissed by the district court when the basis for pendent jurisdiction (the RICO claim) was dismissed. At oral argument the court was advised that state court proceedings had been or were to be initiated. We, of course, do not reach any such claims in this opinion.

enth Circuits, and now the Ninth Circuit, as well as numerous district courts and a respected scholar in this field, have criticized our position.[1]

I believe, as stated in my separate concurrence in *Henning*, that when a proper case arises the multiple scheme requirement should be examined by the court en banc.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[1]*See Henning, supra*, footnote 5, and *Sun Savings & Loan Assn. v. Dierdorff*, No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987).

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Plaintiffs,

v.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

CIVIL 4-86-546

MEMORANDUM AND ORDER

(Filed Feb. 18, 1987)

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402, for defendants.

This matter is before the Court on plaintiffs' motion to reconsider. Plaintiffs' motion will be denied.

FACTS

This is a class action arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs also bring a state law claim pursuant to the Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery. By order dated November 21, 1986, the Court granted defendant Northwestern Bell Telephone Co.'s (Northwestern Bell) motion to dismiss the complaint in its entirety. The facts of the case are set forth in the Court's prior order and will not be extensively reprised here. In brief, plaintiffs allege that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the Minnesota Public Utilities Commission (MPUC), the regulatory body which sets rates which Northwesten Bell may charge for the goods and services it provides. Plaintiffs allege that from early 1980 and through the present Northwestern Bell has offered benefits, rewards and consideration to certain MPUC commissioners, including bribes, offers of employment and various gifts, free meals, and emoluments, with intent to influence these commissioners in the performance of their duties. In its November 21 memorandum and order, the Court found that plaintiffs had failed to allege a "pattern" of racketeering within the meaning of the RICO statute, and accordingly granted defendant's motion to dismiss the RICO counts of plaintiffs' amended complaint. The Court dismissed plaintiffs' pendent state law claim without prej-

udice. Plaintiffs now bring this motion for reconsideration.

DISCUSSION

A. Pattern of Racketeering

It is by now well established that in order to establish a civil RICO cause of action plaintiffs must prove the existence of four elements: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275, 3285 (1985) (footnote omitted); *Simon v. Fribourg*, CIVIL 4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). The RICO act defines "pattern of racketeering injury" in the following terms:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5). In *Sedima* the Supreme Court pointed out that while at least two acts of racketeering are necessary to form a pattern, two acts may not be sufficient. *Sedima*, 105 S.Ct. at 3285 n.14. Rather, it is the factor of continuity plus relationship which combines to produce a pattern. *Sedima*, 105 S.Ct. at 3285 n.14, *citing* S.Rep.No. 91-617, p. 158 (1969). In passing, the *Sedima* majority noted that the failure of Congress or the courts to develop a meaningful concept of "pattern" has contributed to the expansive potential of RICO's application, and suggested that a stricter interpretation of the pattern requirement

might be the key to arresting civil RICO's explosive growth. *Sedima*, 105 S.Ct. at 3287. Subsequently, the lower courts have accepted the Supreme Court's invitation to flesh out the pattern element, albeit with varying results. *See, e.g., Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F.Supp. 1198, 1200 (S.D.N.Y. 1986) (numerous courts have struggled with establishing a definition of pattern of racketeering activity in light of the *Sedima* Court's reasoning and the clear objectives of the RICO statute); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274, 1280 n.7 (5th Cir. 1986) (Fifth Circuit directed its lower courts to consider more rigorous interpretation of the pattern requirement).

In the language of one of the more trusted sources for the definition of English words, a "pattern" is defined as: "an arrangement or composition that suggests or reveals a design; a configuration. . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY (C & G Merriam Co. 1961), *cited in United States v. Freshie Co.*, 639 F. Supp. 442, 444 (E.D.Pa. 1986). The Omnibus Crime Control Act of 1970 provides that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristcs and are not isolated events." 18 U.S.C. § 3575(e), *cited in Sedima*, 105 S.Ct. at 3285 n.14. The courts have suggested that to compose a pattern "the acts complained of must be related to and similar in purpose, and must be part of an ongoing series of acts, rather than separate incidents in a series of sporadic

activities." *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781, 808 (E.D.La. 1986), *citing Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). In their search for a meaningful interpretation of "pattern" the courts have focused on the dual requirements of "relationship" and "continuity" highlighted by the *Sedima* majority.

1. Relationship

Relationship generally has proved the less problematic of the prongs enunciated by *Sedima*. It has been stated that to be related, the predicate acts of a RICO claim must involve common perpetrators, common methods of commission, common victims, and a common motive or purpose. *Medallion TV Enterprises, Inc. v. SelecTV of California, Inc.*, 627 F.Supp. 1290, 1296 (C.D.Cal. 1986); *Graham v. Slaughter*, 624 F.Supp. 222, 225 (N.D.Ill. 1985); *Allington v. Carpenter*, 619 F.Supp. 474, 478 (C.D.Cal. 1985). Relationship requires that the acts of racketeering be related to the operation of the enterprise, that is, sufficiently related to the statutorily proscribed conduct. *Papai v. Cremosnik*, 635 F.Supp. 1402, 1407-08 (N.D.Ill. 1986); *Technology Exchange Corp. of America, Inc. v. Grant County State Bank*, 646 F.Supp. 179, 183 (D.Colo. 1986). As stated by the United States Court of Appeals for the Seventh Circuit in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), "[r]elationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct." *Morgan*, 804 F.2d at 975.

In this case, it is clear that plaintiffs have alleged a "relationship" among and between the predicate acts of

racketeering enumerated in their amended complaint. Plaintiffs have identified common perpetrators, Northwestern Bell and certain of its officers and agents; common victims, Northwestern Bell's ratepayers; and a common motive or purpose, improper influence of MPUC commissioners through bribes, gifts and assorted emoluments. Plaintiffs have alleged that the acts of racketeering are related to the operation of the enterprise, and that each of these acts was directed toward a similar end. In this case, as in most reported RICO decisions, plaintiffs have little difficulty surmounting the "relationship" barrier.

2. Continuity

As the Court noted in its November 21 order, continuity presents a more problematic analysis, both on the facts of this case and in general. At a minimum, continuity means that plaintiffs must allege "more than sporadic or isolated activity." *Graham*, 624 F.Supp. at 225. The term pattern "connotes a multiplicity of events: . . . The continuity inherent in the term presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity." *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 831 (N.D.Ill. 1985). In this respect, ongoing criminal activity or at least a threat of ongoing criminal activity is a key indicium of continuity. *Ghouth v. Conticommodity Services, Inc.*, 642 F.Supp. 1325, 1337 (N.D.Ill. 1986). One court has stated that in determining whether continuity exists, courts should look to "the purposes, results, participants, victims and methods of commission." *Technology Exchange*, 646 F. Supp. at 183-84. Quite obviously, these are identical to the factors to be assessed in gauging "relatedness." The

"inherent contradiction" which exists between the dual requirements of relatedness and continuity is perhaps resolved by recognizing that relatedness requires proof that the predicate acts are "sufficiently connected," while, in contrast, continuity requires proof that the predicate acts are "sufficiently differentiated." *Freshie*, 639 F.Supp. at 445; *Allington*, 619 F.Supp. at 478. To prove relatedness, plaintiffs must demonstrate that the predicate acts evince common perpetrators, victims, methods, motive or purpose. To prove continuity, plaintiffs must demonstrate that the racketeering acts are "sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes." *Allington*, 619 F.Supp. at 478. As stated in *Freshie*:

> [A]n inherent tension exists between the dual requirements of relatedness and continuity. Viewed on a continuum, these two requirements must reach some equitable balance to form a "pattern." . . . [T]he acts must be "sufficiently connected, but also sufficiently differentiated." . . . [A]s the acts become more related, the same transactions lose some of their separateness. On the other hand, if a series of predicate acts satisfied the requirement of "separate criminal episodes," then those acts might well not meet the relatedness requirement, being too disjointed (different subject matter) and too remote (in time).

Freshie, 639 F.Supp. at 445 (citations omitted).

The United States Court of Appeals for the Eighth Circuit has had an opportunity to address the continuity requirement in four post-*Sedima* decisions. In *Alexander Grant and Co. v. Tiffany Industries, Inc.*, 770 F.2d 717 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 799 (1986), the Court stated in dictum that plaintiff's allegations of

twenty-six acts of mail fraud and four acts of wire fraud were sufficient to demonstrate a pattern of racketeering activity. The Court declared:

> The number and nature of acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient "continuity plus relationship" to satisfy the Supreme Court's concerns in *Sedima* that RICO not be extended to reach sporadic activity.

Alexander Grant, 770 F.2d at 718 n.1.

In *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) the court found that plaintiff's allegations of several related acts of mail and wire fraud in furtherance of a scheme to convert gas from plaintiff's pipeline did not rise to the level of a "pattern" of racketeering activity. The Court declared that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not bespeak "continuity" in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," *Superior Oil*, 785 F.2d at 257. The court concluded:

> The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . On the facts of this case, we agree with the court's conclusion in *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Superior Oil, 785 F.2d at 257 (footnote omitted).

In *Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986), plaintiff offered proof of several acts of wire or mail fraud related to a single scheme to draw letters of credit. The Eighth Circuit found that, because defendants' fraudulent acts were undertaken as part of a "common purpose or scheme," there was no showing of continuity, absent proof that the defendants "had engaged in like activities in the past or that they were engaged in other criminal activities." *Holmberg*, 800 F.2d at 210. In the absence of allegations of like wrongful activity in the past or other wrongful activity elsewhere, plaintiff's RICO claim was found to be fatally defective.

The most recent Eighth Circuit teaching on the subject is *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326 (8th Cir. 1986). In *Deviries* plaintiff alleged that the defendant had made misrepresentations to secure his securities brokerage account and then "churned" the account over a six-year period. The Eighth Circuit found that each of the predicate acts alleged were committed in furtherance of a single "scheme," and that accordingly, plaintiff had "failed to allege the continuity necessary to establish a 'pattern' of racketeering activity." *Deviries*, 805 F.2d at 329. Following *Superior Oil* and *Holmberg*, the *Deviries* court found plaintiff's allegations of a "pattern" insufficient absent an "allegation that [defendants] had engaged in similar endeavors in the past or that they were engaged in other criminal activities." *Deviries*, 805 F.2d at 329.

As a number of courts and commentators have noted, the Eighth Circuit's approach to the pattern requirement lies at one end of the spectrum of post-*Sedima* RICO

"pattern" jurisprudence. What is require to allege a pattern of racketeering activity in the Eighth Circuit is proof of multiple criminal schemes or episodes, that is, that defendants have engaged in similar criminal activities in the past or are engaged in other criminal activities elsewhere. Critics of this approach point out that it appears to run contrary to the *Sedima* court's directive that "RICO is to 'be liberally construed to effectuate its remedial purposes,' " *Sedima*, 105 S.Ct. at 3286, *quoting* Pub.L. 91-452, § 904(a), 84 Stat. 947, and that "the imposition of a 'multi-scheme' requirement . . . could arbitrarily exclude large-scale frauds from [RICO's] scope simply because the actors' overall goal—while perhaps no less ambitious or ultimately harmful than a series of short-range illegal plots—happens to be a monolithic one." *McLendon v. the Continental Group, Inc.*, No. 83-1340, slip op. at 8 (D.N.J. July 31, 1986); *Morgan*, 804 F.2d at 975. Advocates of the Eighth Circuit's restrictive approach contend that "[t]his construction of the pattern requirement is the only construction that effectuates Congress' intent to avoid imposition of RICO liability where there have been only isolated or sporadic criminal acts." *Frankart*, 632 F.Supp. at 1201. *See, e.g., Simon*, slip op. at 9 (no pattern where plaintiff does not allege that defendants concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity); *Kredietbank, N.V. v. Joyce Morris, Inc.*, CIVIL No. 84-1903 slip op. (D.N.J. Oct. 11, 1985) (a series of fraudulent mailings did not constitute a pattern of racketeering activity where mailings were all aimed at implementing a single fraudulent scheme); *Medical Emergency Service Association S.C. v. Foulke*, CIVIL 85-4064, slip op. (N.D.Ill. Jan. 7, 1986)

(multiple mailings in furtherance of a single criminal episode are insufficient to establish a pattern of racketeering activity); *Dunham v. Independence Bank of Chicago*, 629 F.Supp. 983 (N.D.Ill. 1986) (no pattern where each of the predicate acts occurred in the execution of a single, though repeated, substantive misrepresentation); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F.Supp. 1418 (W.D.Okla. 1985) (no pattern where claim arises from one engagement to perform one bank audit); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern); *Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermens Mutual Insurance Co.*, 641 F.Supp. 297 (E.D.Pa. 1986) (one isolated fraudulent scheme, even if containing more than one fraudulent act, is not enough to constitute a pattern); *Richardson Greenshields of Canada Ltd. v. Patel*, 643 F.Supp. 672 (S.D.N.Y. 1986) (no pattern where predicate acts were part of a single, unified activity); *Exeter Towers Associates v. Bowditch*, 604 F.Supp. 1547 (D.Mass. 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern).

At the other extreme are those cases, most notably the decision of the United States Court of Appeals for the Fifth Circuit in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), holding that a showing of two related predicate acts is sufficient. *See also Trak Microcomputer Corp. v. Wearne Bros.*, 628 F.Supp. 1089 (N.D. Ill. 1985); *Conan Properties, Inc. v. Mattel, Inc.*, 619 F. Supp. 1167 (S.D.N.Y. 1985); *Systems Research, Inc. v.*

Random, Inc., 614 F.Supp. 494 (N.D.Ill. 1985). Critics of this approach point out that it will invariably "sweep into federal courts, under RICO, the great majority of actions for fraud in commercial transactions." *Exeter*, 604 F. Supp. at 1554.[1]

A number of courts, most notably the United States Court of Appeals for the Eleventh Circuit in *Bank of America National Trust & Savings Association v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), have attempted to steer a middle ground, holding that a single fraudulent scheme which encompasses various predicate acts over a significant period of time satisfies the pattern requirement. *See Freshie*, 639 F.Supp. at 444. Under this approach, it is not necessary to allege multiple criminal schemes, provided that plaintiff alleges an "open-ended scheme" over an extended period of time evincing criminal activity which is continuous in nature rather than isolated. *B.J. Skin & Nail Care, Inc. v. International Cosmetic Exchange, Inc.*, 641 F.Supp. 563, 566 (D.Conn. 1986). In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the Seventh Circuit appeared to adopt this intermediate approach, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions

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[1] The *R.A.G.S.* opinion is unpersuasive for another reason. In the subsequently decided *Smoky Greenhaw* opinion the Fifth Circuit seemed to suggest that the nature of the pattern requirement remained an open question, without reference to *R.A.G.S. See Smoky Greenhaw*, 785 F.2d at 1280 n.7.

somewhat separated in time and place.' . . . ." *Morgan*, 804 F.2d at 975. Advocates of the intermediate approach, dubbed the "multiple episodes plus ongoing course of conduct" standard, *Gidwitz v. Stirco, Inc.*, 646 F.Supp. 825, 829 (N.D.Ill. 1986), contend that it deflects "garden variety" commercial fraud cases while sweeping into the RICO net those cases which are large in scale albeit monolithic. *See, e.g., Temporaries, Inc. v. Maryland National Bank*, 638 F.Supp. 118 (D.Md. 1986); *Louisiana Power*, 642 F.Supp. at 808; *Freshie*, 639 F.Supp. at 445.

Plaintiffs urge the Court to adopt the intermediate approach above-referenced and to find that because the amended complaint includes allegations of various predicate acts committed over an extended, identifiable period of time, the continuity aspect of the pattern requirement is met, notwithstanding that these predicate acts transpired in connection with a single "scheme." As stated by the Court in its prior order, were the Court writing on a clean slate these arguments might well be persuasive. The Eighth Circuit has thrice held, however, that continuity requires proof of multiple criminal episodes. *Superior Oil*, 785 F.2d at 257; *Holmberg*, 800 F.2d at 210; *Deviries*, 805 F.2d at 329. This unbroken line of authority the Court is not free to disregard. Here, plaintiffs' amended complaint includes no allegations of separate transactions—merely separate predicate acts—and no allegations that these predicate acts have independent harmful significance. Each of the predicate acts alleged by plaintiffs was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. The Court is obliged to turn to the

language of *Superior Oil, Holmberg,* and *Deviries*: plaintiffs simply have not alleged that defendants have engaged in like activities in the past or that they are engaged in other criminal activities elsewhere.

The approach adopted by the Eighth Circuit is designed to give meaning to Congress' intended rejection of RICO liability predicated upon isolated or sporadic criminal acts. *Allington,* 619 F.Supp at 478, *citing* 116 Cong.Rec. 35193 (statement of Rep. Poff) (RICO not aimed at the isolated offender). Moreover, the requirement that plaintiffs in a civil RICO action demonstrate that the predicate acts occurred in different criminal episodes is consistent with the connotation of multiple events implicit in the term pattern. *Medallion TV,* 627 F.Supp. at 1296. A "pattern" requires more than one single criminal episode carved into distinct predicate acts. *Commercial Agropequaria Menichetti Fuente S.A.C.I. v. Heather Trading Corp.*, 85 CIVIL 3240, slip op. at 8 (S.D.N.Y. Mar. 27, 1986), *cited at Richardson,* 643 F.Supp. at 674.[2] Although plaintiffs have alleged numerous predicate acts over an extended period of time, it is clear that these acts were part and parcel of a unified, monolithic criminal scheme. The predicate acts alleged by plaintiffs are not "sufficiently unconnected in time and substance to warrant consideration as separate criminal episodes." *Medallion TV,* 627 F.Supp. at 1297.

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[2] As stated by Justice Powell in his *Sedima* dissent, "[t]he definition of pattern may . . . logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a 'pattern' to be proved." *Sedima,* 105 S.Ct. at 3289 (Powell, J. dissenting).

Plaintiffs urge the Court to depart from the multiple criminal schemes test adopted by the Eighth Circuit and to focus instead on factors such as the duration of the alleged racketeering activity and the number of victims. A number of courts and commentators have noted that an interpretation of "pattern" which turns on fine distinctions between single or multiple "episodes" or "schemes" is ill-suited to accomplishment of RICO's central purpose, the eradication of "traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises." ABA Ad Hoc Civil Task Force 71, *quoted in Sedima,* 105 S.Ct. at 3289 (Powell, J., dissenting). These courts have focused analysis on several relevant factors, including:

(1) *Duration*—One indicium of "continuity" is the duration of the alleged criminal activity. To the extent plaintiff alleges criminal activity which is ongoing over an identified period of time, the possibilities are enhanced that defendants are indeed engaged in traditional mobster activity or comparable ongoing structured criminal enterprises. Conversely, where the predicate acts are of a finite and limited duration, directed at a specific goal, the likelihood increases that ordinary commercial fraud is involved.

(2) *Threat of Ongoing Criminal Activity*—Hand-in-hand with duration, which focuses on past events, is the threat of ongoing criminal activity, which focuses on the likelihood that defendant's criminal activities will continue into the future. Absent allegations that defendants' scheme has the potential to continue indefinitely a strong likelihood exists that the wrongs alleged are isolated, not systematic.

(3) *Multiple Victims*—One characteristic of traditional mobster activity or comparable ongoing structured criminal enterprises is the presence of many victims. "The repetition of an act taken against a single victim . . . suggests no expansion, no ongoing design, no continuity, such as was the target of Congress" in enacting RICO. *Satellite Financial Planning Corp. v. First National Bank of Wilmington,* 646 F.Supp. 118, 120 (D.Del. 1986); *Kriedtbank,* slip op. at 9.

(4) *Independent Harmful Significance*—Some courts have looked to the independent harmful significance of the predicate acts alleged by plaintiffs as an indicium of continuity. A predicate act has independent harmful significance if, standing alone, it brings about the injury complained of. A predicate act lacks independent harmful significance if it brings about injury only in conjunction with other predicate acts.

(5) *Methods of Commission*—One factor frequently cited by the courts is the methods of commission employed by the defendants. This factor is perhaps less useful than the others, in that it is well-accepted that the mere fact that defendants have employed more than one fraudulent method does not establish a pattern.

(6) *Regular Part of Defendants' Business*—One court has suggested that "RICO's purposes are best served by also requiring that . . . a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. Rather, the pattern made up of multiple episodes must be a regular part of the way a defendant does business and in that sense, ongoing." *Papai,* 635 F.Supp. at 1412.

The above-referenced factors have been highlighted by some courts as having relevance to the pattern inquiry. The courts have noted that these factors are not exhaustive and that all factors need not be proven in each case. The pattern question must inevitably be decided on a case-by-case basis. *Ghouth,* 642 F.Supp. at 1337. The intent of this analysis is to "flesh out the identifying characteristics of the [term] 'episode,' using the concept of 'continuity' as a guidepost." *Ghouth,* 642 F.Supp. at 1339.

Even assuming that these factors have relevance, the Court would still be constrained to find that plaintiffs have not alleged a pattern of racketeering activity. Plaintiffs have alleged criminal activity of long duration. Whether plaintiffs have alleged the threat of continuing criminal activity is a closer question, particularly in view of the review by the MPUC of its past actions. Plaintiffs have alleged the presence of multiple victims, assuming that the body of Northwestern Bell ratepayers is not one corporate victim, but has not shown independent harmful significance, since it is the aggregate of predicate acts which produced their injuries. Plaintiffs have alleged various methods of commission. It cannot be said, however, that the alleged "pattern" of predicate acts is a "regular part of the way" defendants conduct their business. On balance, the Court finds that, applying the enumerated factors, plaintiffs' allegations do not fit the RICO paradigm. Of course, in the Eighth Circuit the governing standard is the multiple criminal episodes test of *Superior Oil, Holmberg,* and *Deviries.* Applying this test, the Court finds that plaintiffs have not alleged a pattern of racketeering activity. Accordingly, plaintiffs' motion for reconsideration of the Court's RICO ruling is denied.

3. *Enterprise—Person*

Plaintiffs' Count II arises under RICO, 18 U.S.C. § 1962(a). For purposes of their section 1962(a) claim, plaintiffs allege that Northwestern Bell is both a "person" within the meaning of 18 U.S.C. § 1961(3) and an "enterprise" within the meaning of 18 U.S.C. § 1961(4). In its November 21 order the Court noted that the Eighth Circuit has ruled that for purposes of a claim arising under section 1962(c) the RICO enterprise must be distinct from the RICO person. *See Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *on rehearing*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S.Ct. 527 (1983). With this in view, the Court stated that in a section 1962(a) action as in a section 1962(c) action plaintiffs must allege and prove a RICO "enterprise" separate and distinct from the RICO "person."

A number of courts have found that the person and enterprise need not be distinct in a section 1962(a) action. *See, e.g., B.F. Hirsch, Inc. v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 55 U.S.L.W. 2364-65 (9th Cir. Dec. 24, 1986). Other courts have ruled that the distinction pertains in a section 1962(a) action. *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982); *Rush v. Oppenheimer & Co.*, 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985). The Court continues to be of the view that the RICO person and enterprise must be distinct for purposes of a section 1962(a) claim. In addition to the reasons cited in the Court's November 21 order, the Court notes the following:

(1) In the absence of "very explicit statutory language," the courts are not inclined to accept the proposition that a civil RICO defendant could participate with itself in the illicit use or investment of income derived from a pattern of racketeering activity. *Computer Sciences Corp.*, 689 F.2d at 1183.

(2) Because civil RICO was intended to provide a remedy against the infiltrator of legitimate business, and not against the infiltrated enterprise, a separate enterprise-person requirement is appropriate in a 1962(a) action as in a 1962(c) action. *Rush*, 628 F.Supp. at 1197.

(3) Perhaps most significantly, the construction of section 1962(a) urged by plaintiffs would fly in the face of ongoing efforts by Congress and the courts to curtail the expansive reach of civil RICO.

For these reasons, plaintiffs' motion for reconsideration of the Court's 1962(a) statements is denied.

4. *Filed Rate Doctrine*

In its November 21 order the Court found that the federal "filed rate" doctrine precludes plaintiffs' cause of action. Plaintiffs urge the Court to reconsider its position. Plaintiffs have not, however, cited any new authority or arguments in support of its motion for reconsideration. Accordingly, plaintiffs' motion will be denied.

Based on the foregoing, and upon review of all files, records and proceedings herein,

IT IS ORDERED that plaintiffs' motion for reconsideration is in all respects denied.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: February 18, 1987

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Plaintiffs,

v.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

CIVIL 4-86-546

MEMORANDUM AND ORDER

(Filed Nov. 24, 1986)

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402, for defendants.

This matter is before the Court on defendant Northwestern Bell Telephone Company's motion to dismiss and/or for summary judgment, and on plaintiffs' motion to strike defenses. Plaintiffs' motion will be denied. Defendant's motion to dismiss will be granted.

FACTS

Plaintiff H.J., Inc. is a Minnesota corporation with its principal place of business in Burnsville, Minnesota. Plaintiffs Kirk Dahl, Mary Krugen, Larry Krugen, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, and Thomas J. Mott are each Minnesota residents. Each of the named plaintiffs has purchased telecommunications goods and services from Northwestern Bell. Defendant Northwestern Bell Telephone Co., a subsidiary of U.S. West, Inc., is a telecommunications concern supplying goods and services in interstate commerce. Defendants Harry Crump, Leo Adams, Barbara Beerhalter, Roger Hanson, and Juanita Satterlee are present or former members of the Minnesota Public Utilities Commission (MPUC). Defendant Robert Johnson is counsel for the Minnesota Telephone Association. Ray Larson, Roy Weir, Thomas Madison, and Gene Bier are officers and/or employees of Northwestern Bell.

This is a class action arising under the Racketter Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs allege that defendants committed acts in violation of 18 U.S.C. §§ 1962(a), (b), and (c) and further allege that defendants conspired to commit racketeering acts in violation of 18 U.S.C. § 1962(d). Plaintiffs also bring state law claims pursuant to the

Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery.

The gist of plaintiffs' cause of action is an allegation that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the MPUC, the regulatory body which sets rates which Northwestern Bell may charge for the goods and services which it provides. Plaintiffs allege that from July, 1980 and through the present, Northwestern Bell has offered, promised, or given, directly or indirectly, certain benefits, rewards, and consideration to duly appointed MPUC commissioners, with the intent to influence said commissioners with respect to the performance of their duties as officers of the MPUC. Amended Complaint ¶ 30. Specifically, plaintiffs allege the following corrupting acts:

(1) MPUC commissioner Hanson negotiated with Northwestern Bell officials including Gene Bier, Northwestern Bell's chief executive officer, regarding an offer of employment made to Hanson by Northwestern Bell in November, 1984, at a time when Hanson was still an MPUC commissioner. Amended Complaint ¶ 37.

(2) MPUC commissioner Hanson received illicit payments from Northwestern Bell of $30,000 during 1985. The illicit payments were made to Robert Johnson, counsel for the Minnesota Telephone Association, and passed on to Hanson. Amended Complaint ¶ 38. These illicit payments continued after Hanson was reappointed MPUC commissioner on November 25, 1985. Amended Complaint ¶ 39.

(3) Northwestern Bell executives Thomas Madison and Roy Weir made an offer of employment to MPUC Commissioner Juanita Satterlee while Satterlee was still a commission member. Amended Complaint ¶ 40.

(4) Northwestern Bell made illicit payments to Satterlee of $106,129 during the period 1983-1984, while Satterlee was an MPUC commissioner. Amended Complaint ¶ 41.

(5) Northwestern Bell officer Larson provided MPUC commissioner Crump with a free plane ride from Oklahoma to Minneapolis on June 26, 1985. Amended Complaint ¶ 31.

(6) MPUC commissioners Crump and Beerhalter were provided with an all-expenses-paid excursion to Canterbury Downs in September, 1985, courtesy of Northwestern Bell. Amended Complaint, ¶ 32, 36.

(7) MPUC commissioner Crump was provided with tickets to various Broadway plays by Northwestern Bell officials between 1984 and the present. Amended Complaint ¶ 33.

(8) MPUC commissioners Crump and Adams were provided with free tickets to various sporting events by Northwestern Bell officials during the period 1981 to the present. Amended Complaint ¶ 34, 35.

(9) During the period July, 1980 to the present, Northwestern Bell has expended thousands of dollars for various gifts, emoluments, meals, and parties for MPUC commissioners. Amended Complaint ¶ 42.

Plaintiffs' complaint is in five counts. Count I is a state law claim alleging that the defendants bribed MPUC

commissioners by offering to those commissioners benefits, rewards, and consideration to which they were not entitled. Plaintiffs seek civil recovery based on violation of the Minnesota criminal bribery statute, Minn. Stat. § 609.42, subd. 1(1) and (2), and for common law bribery. Count II is a RICO claim arising under section 1962(a). Count III arises under RICO section 1962(b), alleging that the defendants associated with the MPUC in unlawful racketeering activity. Count IV arises under RICO section 1962(c) and Count V is a conspiracy count arising under RICO section 1962(d). Each of the RICO counts involves an allegation that the defendants and the MPUC associated together for the purpose of unlawful racketeering activity.

Plaintiffs seek to recover compensatory damages, measured by the amount received by Northwestern Bell in excess of what would have been a fair and reasonable charge for telephone services. Plaintiffs also seek to recover punitive damages, treble damages pursuant to RICO, 18 U.S.C. § 1984(c), and an injunction prohibiting defendants from engaging in further unlawful activity.[1]

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[1] The Court was pleased to note that on November 7, 1986 the MPUC voted to reconsider a $57.5 million rate increase granted to Northwestern Bell in 1984. As the Court noted at oral argument, the Commission appears to be an appropriate place to consider whether the alleged briberies and other improper contacts had any effect upon the rate increases granted to Northwestern Bell by the MPUC. The MPUC's decision to reopen the case means that the rate differentiations of which plaintiffs complain could be corrected by an MPUC decision to abrogate the 1984 rate increases. Minneapolis Star & Tribune, November 8, 1986, at 1, col. 1.

Defendant Northwestern Bell now brings this motion to dismiss and/or for summary judgment. Plaintiffs have filed a counter-motion to strike defenses.

DISCUSSION

A. *Timeliness*

As a threshold matter, plaintiffs argue that defendant's Rule 12(b)(6) motion to dismiss is untimely. Defendant's motion was filed after defendant's answer to plaintiffs' amended complaint. Rule 12(b)(6) provides that a motion to dismiss for failure to state a claim upon which relief can be granted shall be made "*before* [responsive] pleading if a further pleading is permitted." Fed.R.Civ.P. 12(b)(6) (emphasis added). Rule 12 gives the defendant the option of raising a defense by motion or by the pleadings, however. Courts have discretion to allow 12(b)(6) motions if the defense has been previously included in the answer. 5 C.Wright, A.Miller & M.Kane, *Federal Practice and Procedure* § 1361 at 643 n.35. Here, defendant raised its defenses in its answer. In the exercise of the Court's discretion the defendant will be permitted to bring a Rule 12(b)(6) motion at this time.

B. *Motion to Strike Defenses*

Plaintiffs have brought a motion to strike defendants' third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, and twelfth defenses. Plaintiffs' motion is brought pursuant to Fed.R.Civ.P. 12(f) which provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed.R.Civ.P. 12(f). A Rule 12(f) motion to strike defenses is a drastic remedy which is disfavored by the courts and is infrequently granted. *Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 69 F.R.D. 1, 5 (D. Minn. 1975). A Rule 12(f) motion to strike will be granted only where the Court is convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed. *Carter-Wallace, Inc. v. Riverton Laboratories, Inc.*, 47 F.R.D. 366, 368 (S.D.N.Y. 1969).

Plaintiffs have failed to show that the "drastic remedy" of striking defendants' defenses is appropriate in the case at bar. Each of the challenged defenses is facially valid. Accordingly, plaintiffs' Rule 12(f) motion to strike defenses will be denied.

C. RICO

In order to establish a RICO cause of action plaintiffs must prove the existence of four elements:

(1) conduct

(2) of an enterprise

(3) through a pattern

(4) of racketeering activity.

See Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275, 3285 (1985) (footnote omitted); *Simon v. Fribourg*, CIVIL

4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). Defendant moves to dismiss plaintiffs' RICO claim on the ground that plaintiffs have failed to allege a "pattern" of racketeering activity.

1. *"Pattern" of Racketeering Activity*

An essential element of the RICO civil cause of action is proof that defendants have engaged in a "pattern" of racketeering activity. The "pattern" requirement was subjected to a searching analysis in the Supreme Court's *Sedima* decision. The *Sedima* Court enunciated the following guiding principles:

> (1) two isolated acts of racketeering activity do not constitute a pattern;
>
> (2) it is the factors of *continuity plus relationship* which combine to produce a pattern;
>
> (3) the "pattern" element of the statute was designed to limit RICO's application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes.

See Sedima, 105 S.Ct. at 3285 n.14.[2]

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[2] The *Sedima* Court made the following observations:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not

(Continued on following page)

The United States Court of Appeals for the Eighth Circuit has explored the meaning of "pattern" in a civil RICO context in two recent cases, *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) and *Holmberg v. Morrisette*, CIVIL Nos. 85-5138 and 85-5221 slip op. (8th Cir. Sept. 3, 1986). In *Superior Oil*, the plaintiff proved several related acts of mail and wire fraud in furtherance of a single crime—the conversion or theft of gas from plaintiff's pipeline. The Eighth Circuit found that plain-

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> generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). *See also id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 655. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characterictics and are not isolated events." 18 U.S.C. § 3575(e) 18 USCS § 3575(e). This language may be useful in interpreting other sections of the Act.
>
> *Sedima*, 105 S.Ct. at 3285 n.14.

tiff had satisfied the "relationship" prong of the *Sedima* test, but not the "continuity" prong. The Eighth Circuit explained that proof of a "pattern" of racketeering activity requires more than proof of one racketeering activity and the threat of continuing activity. It is the factor of "continuity plus relationship" which combines to produce a pattern. The court found that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not constitute a "pattern" of racketeering activity for RICO purposes. While the "relationship" prong of the pattern test is met by proof of several related acts of mail and wire fraud, in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," *Superior Oil*, 785 F.2d at 257, it could not be said that plaintiffs had proved "continuity" sufficient to establish their RICO claims. The court concluded:

> [Plaintiff] has, however, failed to prove the "continuity" sufficient to form a "pattern of racketeering activity." The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . On the facts of this case, we agree with the court's conclusion in *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Superior Oil, 785 F.2d at 257 (footnote omitted).

In *Holmberg*[3] plaintiff offered proof of several acts of wire or mail fraud related to a common purpose or scheme. The Eighth Circuit found that plaintiff had satisfied the "relationship" prong of *Sedima*. As in *Superior Oil*, however, the Court found that plaintiff had not satisfied the "continuity" prong. Because defendants' acts of wire and mail fraud were undertaken as part of a common purpose or scheme, there was no showing of continuity, notwithstanding that the single fraudulent effort was implemented by several acts of wire or mail fraud. The court stated: "[t]here was no evidence that [the defendants] had engaged in like activities in the past or that they were engaged in other criminal activities." *Holmberg*, slip op. at 9. In the absence of proof of like past or other present fraudulent activity, plaintiffs' civil RICO cause of action was dismissed.

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[3] In *Holmberg* the Eighth Circuit cited definitions of "pattern" drawn from the Omnibus Crime Control Act of 1970, 18 U.S.C. § 3575(e), wherein Congress provided that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." The *Holmberg* court also looked to legislative history for guidance, citing the following definition of "pattern" drawn from Senate reports:

> The concept of "pattern" is essential to the operation of the statute . . . . The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

Holmberg, slip op. at 9, quoting S.Rep.No. 617, 91st Cong. 2d Sess. 158 (1969).

Distilled to their essence, *Sedima*, *Superior Oil*, and *Holmberg* give rise to the following governing principles. In order to establish a "pattern" of racketeering activity plaintiffs must allege and prove (1) relationship, and (2) continuity. The relationship prong is satisfied by proof of several related acts in furtherance of a single criminal scheme. *Superior Oil*, 785 F.2d at 257; *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, CIVIL No. 84-5156, slip op. at 51 (E.D.La. Aug. 15, 1986); *Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F.Supp. 1198 (S.D.N.Y. 1986); *Simon*, slip op. at 10. The continuity prong is satisfied by proof that the defendants have committed the same or similar racketeering activities in the past or are engaged in other criminal activities elsewhere. *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 9-10.[4]

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[4] See, e.g., *Simon v. Fribourg*, CIVIL No. 4-86-259, slip op. at 9-10 (D.Minn. Aug. 20, 1986) wherein the court declared:

> "[P]roof of a 'pattern of racketeering activity' 'requires more than one 'racketeering activity" and the threat of continuing activity to be effective. It is the factor of *continuity plus relationship* which combines to produce a pattern.'" *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) (emphasis in original) (quoting *Sedima*, 105 S. Ct. at 3275 n. 14). In *Superior Oil*, the plaintiff proved "several related acts of mail and wire fraud" in furtherance of a single crime—the conversion or theft of gas from plaintiff's pipeline. This satisfied the "relationship" prong of the *Sedima* test, but not the "continuity" prong. The failing in plaintiff's evidence was its inability to demonstrate that defendants had engaged in any other criminal activity. *Superior Oil*, 785 F.2d at 257.

Simon, slip op. at 9-10. In *Simon* the court found that plaintiff had failed to allege a civil RICO claim because the racket-

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Applying these principles to the case at bar, it is clear that plaintiffs have satisfied the first prong of the *Sedima* "pattern" test. Plaintiffs have alleged a "relationship" among and between the predicate acts of racketeering allegedly committed by defendants. Quite clearly, the acts allegedly committed by defendants—the alleged illicit distribution of tickets and other amenities to MPUC commissioners during the period 1981 to the present; uncompensated plane rides and excursions to Canterbury Downs during the same period; alleged illicit payments and promises of employment to MPUC commissioners Hanson and Satterlee—were related acts in furtherance of a single alleged criminal scheme, *i.e.*, all were designed to influence MPUC commissioners on behalf of Northwestern Bell.

As to the "continuity" prong of the *Sedima* test, however, plaintiffs' cause of action is much more problematical. While plaintiffs have alleged the existence of several fraudulent acts, each of these acts was committed in furtherance of a *single fraudulent scheme*. Here, as in *Superior Oil*, *Holmberg*, and *Simon*, there simply are no allegations that the defendants have engaged in "like activities in the past" or that defendants are engaged in "other criminal activities" elsewhere. *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 10; *Simon*, slip op. at

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eering acts alleged by plaintiff were "all committed in furtherance of a single criminal act." *Simon*, slip op. at 10. In the absence of proof that the defendants had "concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity" plaintiff's RICO claims must fail, the court found. *Simon*, slip op. at 10.

10. The *Superior Oil-Holmberg* construction of the *Sedima* "pattern" test is extremely restrictive—in order to establish a pattern of racketeering activity plaintiffs must allege and prove multiple illegal schemes, of which the case at bar presents a separable episode. Each of the fraudulent acts alleged by plaintiffs was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. Plaintiffs do not allege that the defendants have engaged in like wrongful activity in the past or are engaged in other wrongful activity elsewhere. *See Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (N.D.Ill. 1985) (the common sense interpretation of "pattern" implies acts occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity). Absent allegations of separable criminal episodes, plaintiffs' cause of action simply does not fit the RICO paradigm—the infiltration of legitimate business by criminal conduct which embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. It is apparent that plaintiffs have attempted to splinter a series of related acts into a civil RICO cause of action. *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F.Supp. 1418, 1423 (W.D.Okla. 1985). As such, plaintiffs' allegations fall short of establishing a "pattern" within the meaning of the RICO statute. Here, as in *Superior Oil* and *Holmberg*, "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several

fraudulent acts, as a 'pattern of racketeering activity.'" *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 10. *See, e.g., Allington v. Carpenter*, 619 F.Supp. 474 (C.D. Cal. 1985) (three acts of wire fraud in connection with a single isolated fraudulent scheme comprised a single criminal episode rather than a "pattern" of racketeering activity); *Morgan v. Bank of Waukegan*, 615 F.Supp. 836, 838 (N.D.Ill. 1985) (single plot spread over several years does not satisfy the pattern requirement); *Cullen v. Nassau County Republican Committee*, II RICO Law Rptr. 564 (E.D.N.Y. 1985) (to establish pattern plaintiffs must show that crimes constituted part of a larger pattern of criminal activity); *Exeter Towers Associates v. Bowditch*, 604 F.Supp. 1547 (D.Mass. 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern).

Plaintiffs cite various decisions of other courts in other circuits where proof of various predicate acts engaged in over a significant period of time has been held to satisfy the "pattern" requirement of civil RICO.[5] *See*

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[5] In a recent decision, *Morgan v. Bank of Waukegan*, 55 U.S.L.W. 2255 (7th Cir. Oct. 23, 1986), the United States Court of Appeals for the Seventh Circuit noted that the "continuity" aspect of the pattern requirement in the aftermath of *Sedima* footnote 14 has created a conflict among the circuits. The Eleventh Circuit has rejected the proposition that the predicate acts must occur in different criminal episodes or schemes, *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), while in contrast the Eighth Circuit has held that where

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Illinois Dept. of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) (defendants' act of mailing nine fraudulent tax returns over a nine-month period constitutes pattern of racketeering); *First Federal Savings and Loan Association of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 629 F.Supp. 427, 445 (S.D.N.Y. 1986) (predicate mail fraud acts arising out of a single scheme constitute pattern); *Pappagiannis v. Pontikis*, 105 F.R.D. 177 (N.D. Ill. 1985) (perpetration of fraud on more than one victim constitutes pattern); *United States v. Freshie Co.*, 639 F.Supp. 442 (E.D.Pa. 1986) (related but distinct methods of criminal activity engaged in over a substantial period of time rose to the level of a pattern of racketeering activity). Were the Court writing on a clean slate, these cases might well be persuasive. In the Eighth Circuit, however, the slate is far from clean.[6] *Superior Oil* and *Holmberg* are on

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all predicate acts were committed in furtherance of a single scheme the continuity requirement has not been met, as discussed above. In *Morgan* the Seventh Circuit elected to steer the middle ground, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they fairly be viewed as constituting separate transactions, *i.e.*, 'transactions 'somewhat separated in time and place." . . .

[6] One court has identified three positions which the courts have taken in construing the continuity and relationship test. At one extreme, plaintiff is required to prove that the defendant was engaged in multiple illegal schemes. This is the position taken by the Eighth Circuit in *Superior Oil* and *Holmberg*. At the other extreme, courts have held that allegations of two related predicate acts is sufficient. An intermediate position taken by some courts requires proof of multiple criminal episodes evincing an ongoing practice or activity. *See Louisiana Power and Light*, slip op. at 52-53.

all fours with the instant case. Under *Superior Oil* and *Holmberg*, plaintiffs have failed to show the requisite "continuity." Accordingly, plaintiffs' RICO claims must be dismissed.

Although plaintiffs' failure to satisfy the continuity prong of the *Sedima* pattern test is fully dispositive of plaintiffs' RICO claims, in the interest of thoroughness, certain of defendant's remaining arguments for dismissal will be briefly addressed.

2. *Enterprise-Person Distinction*

RICO was passed as part of the Organized Crime Control Act. *United States v. Hartley*, 678 F.2d 961, 987 (11th Cir. 1982). Its primary purpose was "to eradicate organized crime and corruption." *United States v. Lee Stroller Enterprises, Inc.*, 652 F.2d 1313, 1317 (7th Cir. 1981). In *United States v. Turkette*, 452 U.S. 576 (1981), the United States Supreme Court interpreted RICO as requiring proof of an "enterprise" engaged in a "pattern of racketeering activity." 452 U.S. at 583. "Enterprise" as defined in 18 U.S.C. § 1961(4) "includes any partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity." Under *Turkette*, the existence of such an enterprise must be established by "evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. Moreover, the enterprise must be shown to have an existence "separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583; *Bennet v. E.F. Hutton, Inc.*, 597 F.Supp. 1547, 1559 (N.D.Ohio 1984).

Defendant moves for dismissal of plaintiffs' Count II on the ground that Count II names Northwestern Bell as both the "person" and the "enterprise" for purposes of plaintiffs' section 1962(a) claim. Defendant argues that Northwestern Bell cannot be both the "person" and the "enterprise" and that Count II is thus fatally defective.

RICO proscribes conduct in which one party, the "person" subject to the statute, acts upon an entity, the "enterprise," in such a manner that the enterprise's affairs are conducted through a pattern of racketeering. *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982). While some courts have held that a legal entity or formal enterprise which has actively participated and benefited from a pattern of racketeering activity can be named as *both* the enterprise and the person, *see United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), the majority position, and the one adopted in this circuit and district, is that the RICO "enterprise" cannot also be the RICO "person." *See Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982). In *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), the Eighth Circuit dismissed one count of plaintiff's complaint for failure to draw a distinction between the RICO enterprise and the RICO person. The *Bennett* ruling was reaffirmed in *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 411 n.6 (8th Cir. 1984), *vacated on other grounds and remanded for reconsideration in light of Sedima*, 105 S.Ct. 3550 (1985), *on remand* 770 F.2d 717 (1985), where the court stated:

> We do observe that [plaintiff's] original complaint alleges that [defendant] is both a "person" and an "enterprise" within the meaning of section 1962(c). It was precisely because of the possibility of such an identity that we held that count II of the complaint in *Bennett v. Berg* [citation omitted] failed to state a claim.

In *Minnesota Odd Fellows Home Foundation v. Engler & Budd Co.*, 630 F.Supp. 797 (D.Minn. 1986), the court found that "in the Eighth Circuit, it is necessary to allege an 'enterprise' separate from the 'person' who allegedly associates with the enterprise." *Odd Fellows*, 630 F.Supp. at 800, *citing Bennett v. Berg*, 685 F.2d at 1089. Because plaintiff in that case had failed to allege the existence of an "enterprise" separate and distinct from the "person" associated with the enterprise, the court dismissed plaintiff's RICO claims.

Plaintiffs' Count II alleges:

> 48. Northwestern Bell Telephone Company is a person within the meaning of 18 U.S.C. 1961(3).
>
> 49. The person referred to in paragraph 48 is also an ongoing enterprise within the meaning of 18 U.S.C. 1961(4).

Amended Complaint ¶¶ 48, 49. Quite clearly, plaintiffs have failed to allege a RICO "enterprise" separate and distinct from a RICO "person." Plaintiffs argue, however, that *Bennett* is not controlling in that the *Bennett* plaintiff's cause of action arose under section 1962(c) of RICO, whereas plaintiffs' Count II arises under section 1962(a). Some courts have held that in actions arising under section 1962(a) the enterprise and the person need not be distinct. *See, e.g., B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *United States v. Freshie*

Co., 639 F.Supp. 442 (E.D.Pa. 1986). Other courts have held that the person-enterprise distinction pertains to 1962 (a) actions as well as 1962(c) actions. *See, e.g., Kredietbank, N.V. v. Joyce Morris, Inc.*, CIVIL No. 84-1903 (D. N.J. Jan. 9, 1986); *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1196-98 (S.D.N.Y. 1985); *Computer Sciences*, 689 F.2d at 1190. The Court finds that in a 1962(a) action, as in a 1962(c) action, plaintiff must allege the existence of an "enterprise" separate and distinct from the "person" identified, for the following reasons:

(1) Both 1962(a) and 1962(c) speak[7] of a "person" committing an unlawful act in connection with, but distinct

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[7] RICO section 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . . .

The thrust of section 1962(a) is a proscription on the use or investment of illegally acquired funds in an enterprise.

RICO, section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The thrust of section 1962(c) is wrongful association with and control of an "enterprise" by a "person."

from, an "enterprise." The consistent use of the two different terms "person" and "enterprise" throughout section 1962 indicates an intent to distinguish those actors throughout.

(2) As stated in *Bennett v. Berg*, "the RICO act proscribes conduct in which one party, the 'person' subject to the statute, acts upon an entity, the 'enterprise' . . . ." *Bennett*, 685 F.2d at 1061. In making this statement, the Eighth Circuit did not distinguish between (a) and (c) of section 1962, and nothing in *Bennett* gives rise to an inference that the court would view section (a) differently from section (c) for purposes of the separate person-enterprise requirement. Absent proof of a "person" acting upon an "enterprise," RICO is inapplicable, by virtue of the plain language of *Bennett*.

(3) Permitting a RICO cause of action where it is alleged that a corporate entity has conducted its own affairs through a pattern of racketeering activity, without any proof of infiltration of that enterprise by outside "persons," would not comport with congressional intention, inasmuch as one of the primary purposes of Congress in enacting RICO was to prevent the takeover of legitimate business by criminals and corrupt organizations. *B. F. Hirsch*, 751 F.2d at 633.

(4) Sections (a) and (c) of 1962 require the presence of the same elements—conduct of an enterprise, a pattern of racketeering activity, and a person. Only the relationship among these elements differs. Section (c) envisions racketeering acts conducted through an enterprise, whereas section (a) portrays the enterprise as the investment object of the criminal violators. Under either (a) or (c), the enterprise must be acted upon by a distinct "person."

(5) A construction of (a) which would obviate the separate enterprise-person requirement would be contrary to the restrictive reading of RICO given by the Eighth Circuit in *Superior Oil* and *Holmberg* and would "aggravate the already hopeless deviation of the RICO statute from its intended purpose in ferreting out organized crime." *Rush v. Oppenheimer & Co.*, 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985).

Accordingly, based on the foregoing, the Court finds that plaintiffs' Count II is deficient as a matter of law.

D. *Filed Rate Doctrine*

Northwestern Bell argues that dismissal of plaintiffs' RICO claims is necessitated by the federal "filed rate" doctrine. In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the Supreme Court affirmed the district court's dismissal of an action predicated on allegations that plaintiffs were forced to pay unreasonably high rates due to misrepresentations made by the defendant in rate proceedings before the Federal Power Commission (FPC). The Supreme Court held that the FPC had exclusive authority to determine a reasonable rate, and that the FPC's decision was conclusive. In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), the Supreme Court reversed the trial court's award of damages measured by the difference between the price defendant had paid to plaintiff pursuant to Federal Energy Regulatory Commission (FERC) approved rates and the price defendant had paid others. The Court held that the "filed rate" doctrine forbids an award of damages based on an estimation of what the FERC "might have done had it been faced with the facts of

[the] case." *Arkansas Gas*, 453 U.S. at 578-79. Northwestern Bell also relies on a line of federal antitrust cases, wherein the courts have held that antitrust plaintiffs are precluded from obtaining damages based on alleged illegal price fixing of utility rates, where the alleged damages are measurable by a comparison of the approved tariff and the tariff that would have been approved absent defendant's wrong-doing. *See Keough v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922); *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 106 S.Ct. 1922 (1986). Northwestern Bell argues that the *Keough* line of antitrust cases has relevance to a RICO action because (1) both RICO and the Clayton Act grant a cause of action to one "injured in his business or property," and because (2) both RICO and the Clayton Act provide for the award of treble damages. Defendant argues that the analogous nature of the Clayton Act and RICO remedies make the *Keough* line of cases of valid precedential authority in a RICO case.

Montana-Dakota, *Arkansas Gas*, and the *Keough* line of cases are squarely on point with plaintiffs' RICO claims. Plaintiffs seek to recover damages measurable by a comparison of MPUC-approved rates and the rates that would have been approved but for defendants' wrongdoing. Under the "filed rate" doctrine, plaintiffs' cause of action is not federally cognizable. The MPUC has exclusive authority to determine a reasonable rate, and the MPUC's decision is conclusive, subject to statutory process. Even assuming that plaintiffs have satisfied the "continuity" prong of *Sedima*, plaintiffs' action must be dismissed by virtue of the filed rate doctrine.

removable claims); *Houlihan v. Anderson-Stokes, Inc.*, 434 F.Supp. 1324, 1329 (D.D.C. 1977) (federal claims dismissed at early stage). Count I of the amended complaint raises an issue of first impression as to the implication of a private cause of action under the Minnesota criminal bribery statute. Needless decision of this unsettled state law issue is best avoided. *Girard v. 94th Street & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *Briggs*, 455 F.Supp. at 82 (novel questions of state law). In sum, no "unusual circumstances," *Nolan v. Meyer*, 520 F.2d 1276, 1280 (2d Cir.), *cert. denied*, 423 U.S. 1034 (1975), justifying federal jurisdiction over the pendent state claims are present here. Consequently, plaintiffs' Count I will be dismissed without prejudice as outside the subject matter jurisdiction of the court. *See Kuhn v. National Association of Letter Carriers, Branch 5*, 570 F.2d 757, 761 (8th Cir. 1978) (district court did not have power to consider pendent state claim because it did not have jurisdiction over the federal claim).

Based on the foregoing, and upon all the files, records, and proceedings in this matter,

IT IS ORDERED that:

1. plaintiffs' motion to strike defenses is denied;

2. defendant's motion to dismiss Counts II-V of plaintiffs' amended complaint is granted; and

3. defendant's motion to dismiss Count I of plaintiffs' amended complaint is granted, and Count I is dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

E. *State Law Claims*

Plaintiffs' Count I is a state law claim arising under Minn. Stat. § 609.42 and the common law of bribery. In *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), the seminal case on the pendent jurisdiction of the federal courts, the United States Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726. This bold statement has been subsequently qualified somewhat, the Court stating in *Rosado v. Wyman*, 397 U.S. 397 (1970) that whether to proceed with state claims lacking an independent basis of federal jurisdiction after all federal claims have been dismissed is discretionary with the trial court. 397 U.S. at 404; *Silva v. Vowell*, 621 F.2d 640 (5th Cir. 1980); *McGann v. Mungo*, 578 F.Supp. 1413 (D.S.C. 1982). Factors to consider in the exercise of the Court's discretion include considerations of judicial economy, convenience and fairness to litigants, and the avoidance of needless decisions of state law. *Gibbs*, 383 U.S. at 726. *Reyes v. Edmunds*, 416 F.Supp. 649 (D.Minn. 1976). *See also Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340, 1346 (8th Cir. 1980) (adopting *Gibbs* factors); *Pink Supply Corp. v. Hiebert, Inc.*, 612 F.Supp. 1334, 1347 (D.Minn. 1985).

Each of the relevant factors supports dismissal of plaintiffs' pendent state law claims. The case is still at an early stage, so that there has been no substantial commitment of federal judicial resources. *See, e.g., Briggs v. American Air Filter Co.*, 455 F.Supp. 179 (N.D.Ga. 1978) (no substantial commitment of judicial resources to non-

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: November 21, 1986

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated, Plaintiffs, vs. Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators, Defendants.	File No. CV 4 86 0546 DEFENDANT NORTHWESTERN BELL TELEPHONE COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' RICO CLAIMS

TO: Plaintiffs H.J. Inc., Kirk Dahl, Larry Krugen, Mary Krugen, Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, and Thomas J. Mott, and to their attorneys Cochrane & Bresnahan, 24 East Fourth Street, Saint Paul, Minnesota 55101, and Reinhardt and Anderson, Town Square, 1014 Conwed Tower, 444 Cedar Street, Saint Paul Minnesota 55101

PLEASE TAKE NOTICE that at 10:00 a.m. on Wednesday, October 1, 1986, or as soon thereafter as counsel may be heard, defendant Northwestern Bell Telephone Company will move the above-named Court before

the Honorable Harry H. MacLaughlin, United States District Judge, at the United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota, for an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing the RICO claims alleged in Counts II, III, IV, and V of plaintiffs' First Amended Complaint for failure to state a claim upon which relief can be granted.

This motion is based upon all the files, records, and proceedings herein, including the accompanying Memorandum of Law in support of this motion.

Dated: September 10, 1986

FAEGRE & BENSON

/s/ By James L. Volling
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John F. Beukema
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APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated, Plaintiffs, v. Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators, Defendants.	File No. CV 4 86 0546 ANSWER OF DEFENDANT NORTHWESTERN BELL TELEPHONE COMPANY TO FIRST AMENDED COMPLAINT

Defendant Northwestern Bell Telephone Company (hereinafter, the "Defendant"), for its answer to the first amended complaint (hereinafter "complaint") herein, alleges and states:

FIRST DEFENSE

1. Except as otherwise specifically admitted, answered, or qualified herein, every allegation, statement, matter or thing set forth in the complaint is hereby expressly denied.

2. Answering paragraphs 1 and 2 of the complaint, Defendant admits that it resides in this district and trans-

acts a part of its business within this district, but Defendant denies that this Court has jurisdiction over it for purposes of this action and denies that venue properly lies in this district for purposes of this action.

3. Answering paragraph 3 of the complaint, Defendant states that it assumes that the term "Northwestern Bell" refers to the Defendant. Based on his assumption, Defendant further states that it is an Iowa corporation and a subsidiary of Northwestern Bell Corporation, which is, in turn, a subsidiary of U.S. West, Inc. Further answering paragraph 3, Defendant admits that it is a telecommunications company supplying telephone service in the State of Minnesota and that it is engaged in interstate commerce.

4. Answering paragraph 4 of the complaint, Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

5. Answering paragraph 5 of the complaint, Defendant admits that it has a customer named Kirk Dahl who has purchased both residential and business telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

6. Answering paragraph 6 of the complaint, Defendant admits that it has a customer listed as L. Krugen, whose spouse is listed as Mary, who has purchased residential telephone service from Defendant and a customer named Photo Images that has purchased business telephone service from Defendant; otherwise Defendant states

that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

7. Answering paragraph 7 of the complaint, Defendant admits that it has a customer named S. J. Davis who has purchased residential telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

8. Answering paragraph 8 of the complaint, Defendant admits that it has a customer named Robert Neal who has purchased both residential and business telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

9. Answering paragraph 9 of the complaint, Defendant admits that it has a customer named Isaac H. Ward who has purchased residential telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

10. Answering paragraph 10 of the complaint, Defendant admits that it has a customer named Richard L. Anderson who has purchased residential telephone service from Defendant; otherwise Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

11. Answering paragraph 11 of the complaint, Defendant admits that it has a customer named Thomas J. Mott who has purchased residential telephone service from Defendant; otherwise Defendant states that it is without

knowledge or information sufficient to form a belief as to the truth of the averments thereof.

12. Answering paragraph 12 of the complaint, Defendant states that the averments of the paragraph are obviously in error, in that, by reason of cross-references to paragraphs 5 through 14, this paragraph identifies all but one of the named plaintiffs as "unnamed defendants." Assuming that the correct cross-references should be to paragraphs 13 through 22, Defendant states that it does not understand the concept of "unnamed defendants," that no such concept is contemplated by any statute or rule of law known to Defendant, and that the persons identified in this paragraph are not, and cannot be, "unnamed defendants" in this action. Defendant further denies that any of the persons identified in paragraphs 13 through 22 of the amended complaint "aided and abetted the defendants" or "conspired with the defendants to commit the acts alleged in Counts I-V" of the complaint.

13. Answering paragraphs 13 through 17 of the complaint, Defendant states that plaintiffs have failed to identify the "Commission" to which these paragraphs refer. On the assumption that "Commission" as used in these paragraphs is intended to refer to the Public Utilities Commission of the State of Minnesota, Defendant states that it believes that Harry Crump and Barbara Beerhalter now are members of the said Commission, and that Leo Adams, Roger Hanson and Juanita Satterlee at some time in the past have been members of the said Commission, but Defendant does not know the precise dates of the terms of office served by them as members of the said Commission.

14. Answering paragraph 18 of the complaint, Defendant admits that Robert W. Johnson is an attorney licensed to practice law in the State of Minnesota and is counsel for the Minnesota Telephone Association.

15. Answering paragraph 19 of the complaint, Defendant admits that Roy Larson is an employee of Defendant.

16. Answering paragraph 20 of the complaint, Defendant admits that Roy Weir was an employee of Defendant, denies that Mr. Weir was an officer of Defendant, and states that Mr. Weir retired from Defendant's employ at the end of February 1986.

17. Defendant admits the allegations of paragraph 21 of the complaint.

18. Assuming that "Northeastern Bell" refers to Defendant, Defendant admits the allegations of paragraph 22 of the complaint.

19. Answering paragraphs 23 through 28 of the complaint, Defendant admits that plaintiffs purport to bring this action as a class action and that plaintiffs have retained competent counsel but denies the remaining allegations of these said paragraphs and denies that this action is properly maintainable as a class action.

20. Answering paragraph 29 of the complaint, Defendant states that it does provide telecommunications service within the State of Minnesota and that it is engaged in interstate commerce. Defendant admits that it did, prior to January 1, 1984, sell or lease telecommunication equipment; that it provides telephone service and access to long distance service; that it owns and operates tele-

phone lines and exchanges; and that it performs other telecommunication functions. Defendant also admits that, within the limitations of specific statutory provisions, the Minnesota Public Utilities Commission has jurisdiction over some activities of Defendant and other telephone companies, including some aspects of rate making.

21. Defendant denies the allegations of paragraph 30 of the complaint.

22. Answering paragraph 31 of the complaint, Defendant admits that on June 26, 1986, Public Utilities Commissioner Harry Crump rode between Oklahoma and Minneapolis on an airplane owned by Defendant. Defendant denies that this trip was made free of charge and states that it was reimbursed for the value of this airplane ride by the State of Minnesota. Defendant denies that this airplane ride was provided to Mr. Crump by Defendant's employee, Ray Larson. Defendant further states that the ride was offered to Mr. Crump because there was unused space on Defendant's airplane; Defendant's airplane would have made the trip regardless of Mr. Crump; and Mr. Crump indicated his previously planned means of transportation was confronting him with extreme scheduling difficulties.

23. Defendant denies the allegations of paragraph 32 through 36 of the complaint.

24. Defendant denies the allegations of paragraph 37 of the complaint and further states that with the knowledge and approval of Gene Bier, Roy Weir had an exploratory meeting with Roger Hanson during December 1984 during which Mr. Weir and Mr. Hanson discussed the possibility that a group of telephone companies might be interested in retaining Mr. Hanson as a consultant after the expiration of his term on the Commission. No offer was made or accepted at that meeting. Mr. Weir did not discuss with Mr. Hanson possible employment of Mr. Hanson by Defendant, and Mr. Bier did not have knowledge of or approve any discussion between M. Weir and Mr. Hanson regarding such possible employment of Mr. Hanson by Defendant.

25. Answering paragraph 38 of the complaint, Defendant admits that it paid fees in excess of $30,000 during the year 1985 which were received by Roger Hanson for consulting services. Defendant further admits that these fee payments were made to Robert W. Johnson for the benefit of Roger Hanson. Defendant further states that all such fees were paid by it during a period of time when Roger Hanson was a private citizen and not a member of the Minnesota Public Utilities Commission. Defendant further states that the fee payments were made to Robert W. Johnson pursuant to a plan whereby the consulting services of Roger Hanson were to be retained by a group of telephone companies, each of which would have paid its share of Mr. Hanson's fees to Mr. Johnson for transmittal to Mr. Hanson.

26. Answering paragraph 39 of the complaint, Defendant admits that Roger Hanson was reappointed to the Minnesota Public Utilities Commission on or about November 25, 1985, but denies that it made any fee payments for consulting services to Mr. Hanson after the date of his aforesaid reappointment.

27. Defendant denies the allegations of paragraph 40 of the complaint. Defendant further states that Thomas

Madison had one exploratory discussion with Juanita Satterlee during May 1983, while Ms. Satterlee was a member of the Minnesota Public Utilities Commission, concerning the possibility that Defendant might retain Ms. Satterlee as a consultant after her previously planned resignation from the Commission. No offer was then made to Ms. Satterlee and a number of additional discussions took place between Defendant and Ms. Satterlee after she left the Minnesota Public Utilities Commission prior to Defendant's offer to retain Ms. Satterlee as a consultant.

28. Answering paragraph 41 of the complaint, Defendant states that its first payment of fees and expenses to Ms. Satterlee for consulting services was received by her in December 1983 and that Defendant's fee and expense payments to Ms. Satterlee from December 1983 through December 1984 totalled $106,129.

29. Answering paragraph 42 of the complaint, Defendant states that between July 1980 and the present Defendant reimbursed certain employees for legitimate business expenses authorized by law and incurred in connection with meetings between said employees and various Commissioners. The total value of all said expenses during said six-year period did exceed two thousand dollars and were for expenditures for meals and a few tokens of nominal value.

30. Answering paragraph 43 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 29 of this answer.

31. Defendant denies the allegations of paragraph 44 through 46 of the complaint.

32. Answering paragraph 47 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 31 of this answer.

33. Defendant denies the allegations of paragraphs 48 through 54 of the complaint.

34. Answering paragraph 55 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 33 of this answer.

35. Defendant denies the allegations of paragraphs 56 through 62 of the complaint.

36. Answering paragraph 63 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 35 of this answer.

37. Defendant denies the allegations of paragraphs 64 through 70 of the complaint.

37. Answering paragraph 71 of the complaint, Defendant incorporates by reference and hereby realleges paragraphs 1 through 37 of this answer.

39. Defendant denies the allegations of paragraphs 72 through 75 of the complaint.

SECOND DEFENSE

40. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

41. This court lacks jurisdiction over the subject matter of this action.

FOURTH DEFENSE

42. The venue of this action is improper.

FIFTH DEFENSE

43. This action is barred in whole or in part by the applicable statutes of limitations.

SIXTH DEFENSE

44. Primary jurisdiction to determine the rates underlying plaintiffs' claims for damages resides in the Minnesota Public Utilities Commission.

SEVENTH DEFENSE

45. Plaintiffs have failed to exhaust their administrative and judicial remedies under the laws of the State of Minnesota.

EIGHTH DEFENSE

46. Plaintiffs' claims against Defendant fail to comply with the pleading requirements of Federal Rules of Civil Procedure 8, 9(b), and 11.

NINTH DEFENSE

47. Plaintiffs' claims against Defendant for alleged RICO violations are barred in that plaintiffs have failed to identify and properly plead the requisite "person," "enterprise," and "pattern of racketeering activity."

TENTH DEFENSE

48. Plaintiffs' claims against Defendant for alleged RICO violations are barred in that plaintiffs have not

been injured in their business or property by any conduct of Defendant.

ELEVENTH DEFENSE

49. Plaintiffs' pendent state law claims against Defendant are barred in that no private civil cause of action for bribery exists under Minnesota law.

TWELFTH DEFENSE

50. This Court should abstain from the exercise of jurisdiction until issues raised by the complaint are resolved by the Minnesota Public Utilities Commission.

Dated: August 4, 1986.

FAEGRE & BENSON

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APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

H. J. Inc., a Minnesota Corporation, Kirk Dahl, Larry Krugen and Mary Krugen individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Plaintiffs,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants

FIRST AMENDED COMPLAINT

JURY TRIAL DEMANDED

File No: CV 4 86 0546

Plaintiffs, for their cause of action against defendants and each of them, complain as follows:

JURISDICTION AND VENUE

1. This action arises under and jurisdiction of this court is invoked under:

a) 18 U.S.C. 1964, subd. (a) and (e).

b) Applicable provisions of common law and Minn. Stat. § 609.42, subd. 1(1) and (2) under the Court's pendent jurisdiction.

2. The Defendants reside in this district and transact their affairs in this district. Venue properly lies in this district pursuant to 18 U.S.C. § 1965, subd. (a).

PARTIES

3. Northwestern Bell, a subsidiary of U.S. West, hereinafter Northwestern Bell, is a telecommunications company supplying telephone goods and services in the State of Minnesota and is engaged in interstate commerce.

4. H. J. Inc., is a Minnesota Corporation which has purchased from Northwestern Bell telecommunication goods and services at its principal place of business in Burnsville, Minnesota.

5. Kirk Dahl is a resident of the Township of West Lakeland, and has purchased from Northwestern Bell telecommunication goods and services at his home. He is a dentist with a practice in Lake Elmo, and has purchased from Northwestern Bell telecommunication goods and services at his business in the City of Lake Elmo.

6. Mary and Larry Krugen are residents of the city of Oakdale, and have purchased from Northwestern Bell telecommunication goods and services at their home. They are owners of Photo Images, a partnership, which has purchased from Northwestern Bell telecommunication goods and services at its place of business in Oakdale.

7. Susan Davis is a resident of the Township of Minnetonka, and has purchased from Northwestern Bell telecommunication goods and services at her home.

8. Robert Neal is a resident of Richfield, Minnesota, and has purchased from Northwestern Bell telecommunication goods and services at his home. He is a psychologist with a practice in Hennepin County and has purchased from Northwestern Bell telecommunication goods and services at his place of business.

9. Isaac H. Ward is a resident of Minneapolis, Minnesota and has purchased from Northwestern Bell telecommunication goods and services at his home.

10. Richard L. Anderson is a resident of White Bear Lake, Minnesota and has purchased from Northwestern Bell telecommunication goods and services at his home.

11. Thomas J. Mott is a resident of Little Canada, Minnesota and has purchased from Northwestern Bell telecommunication goods and services at his home.

12. Those named in paragraphs 5 through 14 are unnamed defendants, but aided and abetted the defendants and who conspired with the defendants to commit the acts alleged in Counts I-V herein.

13. Harry Crump was a member of the Commission from January 3, 1984 to the present.

14. Leo Adams was a member of the Commission from 1980 to January, 1986.

15. Barbara Beerhalter was a member of the Commission in 1984 to the present.

16. Roger Hanson was a member of the Commission in 1979 to January, 1985, and November 25, 1985 to January, 1986.

17. Juanita Satterlee was a member of the Commission from 1977 to 1983.

18. Robert Johnson is an attorney licensed to practice law in the State of Minnesota, and is counsel for the Minnesota Telephone Association.

19. Ray Larson is an employee of Northwestern Bell.

20. Roy Weir is an executive officer of Northwestern Bell.

21. Thomas Madison is an executive officer of Northwestern Bell.

22. Gene Bier is an executive officer of Northwestern Bell.

CLASS ACTION ALLEGATIONS

23. The plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other persons, firms and corporations (the class) who, during the period July 1, 1980 to the present, were either residential or business purchasers of the telecommunication goods and services provided by Northwestern Bell.

24. The members of the class are so numerous that joinder of all members is impracticable. The precise number of members of the class can be readily determined from defendants' records and files.

25. The claims of the plaintiffs are typical of the claims of the other members of the class. The plaintiffs

will fairly and adequately protect the interests of the class.

26. The plaintiffs have retained competent counsel experienced in the prosecution of class litigation.

27. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members. These common questions of law and fact include among others:

a) Whether the defendants violated the Racketeer Influenced and Corrupt Organizations Act, Title 18 U.S.C. 1961-1968 as amended:

1) by committing acts in violation of 18 U.S.C. 1962(a), (b) and (c)

2) by conspiring to commit acts in violation of Title 18 U.S.C. § 1962(d)

b) By committing or attempting to commit acts of bribery in violation of common law and Minn. Stat. § 609.42, subd. 1(1) and (2).

28. Class action is superior to other available methods for the fair and effecient adjudication of this controversy.

FACTUAL ALLEGATIONS

29. During the relevant period alleged herein, the defendant, Northwestern Bell, was a telecommunications provider in the state of Minnesota engaged in interstate commerce. Specifically, it sold or leased telecommunication equipment, phone service, provided access to long distance service, owned and operated telephone lines and ex-

changes, and performed other telecommunication functions. Public Utilities Commission (P.U.C.) was given jurisdiction and supervisory power and rate making power over telephone companies doing business in the State of Minnesota on July 1, 1980 pursuant to Minn.Stat. § 237.02.

30. That from July 1, 1980 to the present and continuing, Northwestern Bell has attempted to, or did offer, gave or promised to give, directly or indirectly, to the public officials who were duly appointed commissioners of the Public Utilities Commission, benefits, rewards, and consideration, to which they were not legally entitled, with the intent to influence such officers with respect to the performance of their powers and duties as such officers of said commission.

Specifically but not limited to the following acts:

31. On June 26, 1985, Ray Larson provided P.U.C. member Harry Crump, with a free airplane ride between Oklahoma and Minneapolis.

32. In September 1985, P.U.C. member Harry Crump, was provided with an all expenses paid day at the Canterbury Downs race track by Northwestern Bell.

33. Between the year 1984 and the present, Commissioner Harry Crump was provided tickets to a Broadway play by Northwestern Bell.

34. Between the years 1984 and the present, Commissioner Harry Crump was provided with tickets to various sporting events paid for by Northwestern Bell.

35. P.U.C. Commissioner Leo Adams was provided with tickets to sporting events paid for by Northwestern Bell executives during the years 1981 to 1984.

36. In September 1985, P.U.C. Commissioner Barbara Beerhalter was provided with an all expense paid day at the Canterbury Downs race track paid for by Northwestern Bell.

37. That Northwestern Bell Lobbiest Roy Weir negotiated on the employment of Commissioner Roger Hanson with Northwestern Bell while Roger Hanson was still a Commissioner in November, 1984. These negotiations were discussed and approved by Gene Bier, Northwestern Bell's Chief Executive Officer.

38. Former Commissioner Roger Hanson received payments in excess of $30,000 from Northwestern Bell during the year 1985. These payments were not paid directly to Roger Hanson, but rather were paid to attorney Robert W. Johnson, and passed on to Roger Hanson.

39. Roger Hanson was reappointed to the P.U.C. on November 25, 1985 and payments continued to Robert W. Johnson for Roger Hanson.

40. Northwestern Bell executives, Thomas Madison and Roy Weir, negotiated employment with Northwestern Bell of P.U.C. Commissioner Juanita Satterly, while Juanita Satterly was still a member of the Commission in the spring of 1983.

41. Between the summer of 1983 and December of 1984, Northwestern Bell paid former Commissioner Juanita Satterly, $106,129.00.

42. Between July 1980 and the present, Northwestern Bell paid for presents for P.U.C. commissioners, paid for parties for P.U.C. commissioners, and paid for meals for

P.U.C. commissioners. The value of these items totaled thousands of dollars.

COUNT I

PENDENT STATE CLAIMS ASSERTED ON BEHALF OF THE CLASS

43. Plaintiffs incorporate by reference and reallege paragraphs 1 through 42 as if fully set forth in this count.

44. The defendant herein, violated state law in that it attempted to, or did, do acts and make payments that amounted to bribery of members of the Public Utilities Commission by offering, giving or promising to give, directly or indirectly, to those public officials, benefits, rewards, and consideration to which they were not legally entitled with intent thereby to influence such officers and employees, with respect to the performance of their powers and duties as such officer or employees, all in violation of Minn. Stat. § 609.42, subd. 1(1).

45. The defendant herein violated state law in that it conspired with, or aided and abetted a public officer or employee to request, receive or agree to receive, directly or indirectly, a benefit, reward or consideration to which said public officer or employee was not entitled with the understanding that he, the public officer or employee, would be influenced with respect to the performance of his powers or duties as such officer or employee, all in violation of Minn. Stat. § 609.42, subd. 1(2).

46. The defendant violated Minnesota common law in that they attempted to, or did, bribe public officials.

RICO CLAIMS

COUNT II

VIOLATION OF 18 U.S.C. 1962(a).

47. Plaintiffs incorporate by reference and reallege paragraphs 1 through 46 of this complaint as though fully set forth herein.

48. Northwestern Bell Telephone Company is a person within the meaning of 18 U.S.C. 1961(3).

49. The person referred to in paragraph 48 is also an ongoing enterprise within the meaning of 18 U.S.C. 1961(4).

50. Northwestern Bell has received income derived directly or indirectly through a pattern of racketeering activity involving at least two acts of bribery under Minn. Stat. § 609.42, subd. 1(1) and (2), all of which is in violation of 18 U.S.C. 1962(a).

51. The predicate acts of bribery are referred to in paragraphs 29 through 42 of this complaint.

52. That income was derived, either directly or indirectly, or the proceeds of such income was derived from said acts and said income was used in the operation of the enterprise.

53. That the enterprise engaged in, or its activities affected, interstate commerce.

54. That plaintiffs, and the class, were injured in their business or property by reason of this violation of 18 U.S.C. 1962(a).

COUNT III

VIOLATION OF 18 U.S.C. 1962(b)

55. Plaintiffs incorporate by reference and reallege paragraphs 1 through 54 above as if fully set forth herein.

56. Northwestern Bell Telephone Company, Thomas Madison, Harry Crump, Juanita R. Satterlee, Leo G. Adams, Roger Hanson, Barbara Beerhalter, Robert Johnson, Roy Wier, Ray Larson and Gene Bier are persons within the meaning of 18 U.S.C. 1961(3).

57. That the Public Utilities Commission is an enterprise within the meaning of 18 U.S.C. 1961(4).

58. That the persons named in paragraph 56, aided and abetted by each other, their agents and employees, and others, engaged in a pattern of racketeering activity consisting of at least two acts which involve bribery under Minn. Stat. § 609.42, sub. 1(1) and (2), all of which are in violation of 18 U.S.C. 1962(b).

59. That the persons referred to in paragraph 56 above, aided and abbetted by each other, their agents and employees, and others, through the pattern of racketeering activity described in paragraph 58 above, aquired or maintained, directly or indirectly, interest or control of the Public Utilities Commission, an enterprise above described.

60. The predicate acts of bribery are referred to in paragraphs 29 through 42 above.

61. Plaintiffs and the class were injured in their business or property by reason of this violation of 18 U.S.C. § 1962(c).

62. The enterprise engaged in or its activities affected interstate commerce.

COUNT IV

VIOLATION OF 18 U.S.C. 1962(c)

63. Plaintiffs incorporate by reference and reallege paragraphs 1 through 62 above as if fully set forth herein.

64. Northwestern Bell Telephone Company, Thomas Madison, Harry Crump, Juanita R. Satterlee, Leo G. Adams, Roger Hanson, Barbara Beerhalter, Robert Johnson, Roy Wier, Ray Larson and Gene Bier are persons within the meaning of 18 U.S.C. 1961(3).

65. The Public Utilities Commission is an enterprise within the meaning of 18 U.S.C. 1961(4).

66. The persons above named and others associated with or employed by those persons, were employed by, or associated with the enterprise.

67. The enterprise engaged in or its activities affected interstate commerce.

68. The persons above named, aided and abbetted by each other, their agents and employees, and others, conducted and participated directly or indirectly in the conduct and affairs of the enterprise through a pattern of racketeering activity consisting of at least two acts of bribery, all of which is in violation of 18 U.S.C. § 1962(c).

69. The predicate acts of bribery are referred to in paragraphs 29 through 42 above.

70. Plaintiffs and the class were injured in their business or property by reason of the above violation of 18 U.S.C. § 1962(c).

COUNT V

VIOLATION OF 18 U.S.C. § 1962(d)

71. Plaintiffs incorporate by reference and reallege paragraphs 1 through 70 above as is fully set forth herein.

72. Northwestern Bell Telephone Company, Thomas Madison, Harry Crump, Robert Johnson, Juanita R. Satterlee, Leo G. Adams, Roger Hanson, Barbara Beerhalter, Robert Johnson, Roy Wier, Ray Larson and Gene Bier are persons within the meaning of 18 U.S.C. 1961(3).

73. The persons in paragraph 72 above conspired together to violate the provisions of 18 U.S.C. § 1962(a), (b) and (c).

74. Plaintiffs and the class were injured in their business or property by reason of the above violation of 18 U.S.C. 1962(d).

DAMAGES

75. The plaintiffs and the class they seek to represent, were damaged in that, by reason of the actions alleged in Count I-V herein, the compensation Northwestern Bell was allowed to receive by the P.U.C. was in excess of what would be fair and reasonable charges to plaintiffs and members of the class, and that said unfair and unreasonable compensation was caused by the involvement in bribery, attempts to bribe, conspiracy and racketeering activities alleged in this complaint.

WHEREFORE, Plaintiffs and members of the class demand judgment against defendants as follows:

A. Declaring this to be a proper class action under Rule 23 of the Federal Rules of Civil Procedure;

B. As to all Counts, judgment against defendants jointly and severally for damages in an amount to be determined to have been sustained by plaintiffs and the other members of the class;

C. On all Counts, an award of appropriate interest, costs and disbursements of this action including reasonable attorneys fees in accord with 18 U.S.C. § 1964(c).

D. For an award of punitive and exemplary damages against defendants jointly and severally, in an amount to be awarded at trial.

E. For a treble damages award in accord with 18 U.S.C. § 1984(c).

F. For an injunction preventing the defendants from engaging in further illegal activity under Minn. Stat. § 609.42, or other activity prohibited by 18 U.S.C. § 1962 or any other applicable law.

G. For such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiffs demand trial by jury on all Counts.

Dated: July 15, 1986

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